# BASIC CONCEPTS OF COPYRIGHT

## Overview

Copyright law protects original expressions of ideas, not the ideas themselves. In Malaysia, the Copyright Act 1987 sets out the rules on how copyright is obtained, when it exists, how long it lasts, and what it protects. To understand copyright properly, you must understand how it comes into existence, its duration, and the types of works that qualify for protection. Protected works include literary works, musical works, artistic works, films, sound recordings, and broadcasts.

## Concept of Attainment and Subsistence of Copyright

Copyright subsists automatically once the requirements of the Copyright Act 1987 are met. No registration is required. The key questions are whether the work falls within a protected category and whether it meets the requirements of originality and fixation. The Act protects works regardless of quality or purpose, as long as they fall within the recognised categories.

## WORKS ELIGIBLE FOR COPYRIGHT PROTECTION

The Copyright Act 1987 recognises the following categories of protected works: literary works, musical works, artistic works, films, sound recordings, and broadcasts. These categories are defined in Section 3 and explained further through statutory provisions and case law.

1) Protection of Literary Works

Section 3 defines “literary work” broadly. The word “includes” is used instead of “means”, showing that the list is not exhaustive and other works may also qualify as literary works.

However, the definition excludes official government or statutory texts of a legislative or regulatory nature, judicial decisions, political speeches and debates, speeches made in legal proceedings, and their official translations.

In ***University of London Press v University Tutorial Press Ltd [1916]***, the court held that a literary work does not need aesthetic in nature. It is enough that the work is expressed in writing. This case confirms that copyright also protects functional and informational writings, not only creative literature.

2) Protection of Musical Works

Under Section 3, a “musical work” includes any musical composition, including works created for musical accompaniment. Protection covers the music itself, as well as accompanying elements such as lyrics or words. A musical work is protected whether or not it is recorded or performed.

3) Protection of Artistic Works

Section 3 defines “artistic work” as:

- a graphic work, photograph, sculpture or collage, regardless of artistic quality;
- a work of architecture, including buildings and building models; or
- a work of artistic craftsmanship.

It does not include a layout-design under the Layout-Designs of Integrated Circuits Act 2000.

A “graphic work” includes paintings, drawings, diagrams, maps, charts, plans, engravings, and similar works. A key issue is whether technical or engineering drawings fall within this definition.

In ***Peko Wallsend Operations Ltd v Linatex Process Rubber Bhd [1993]***, the court held that engineering drawings are artistic works and that both the drawings and the three-dimensional products made from them were protected by copyright. This showed that artistic quality is not required. However, this position no longer applies in Malaysia after the 1996 amendments, which removed copyright protection for functional and industrial designs.

Functional and Industrial Designs

Section 7(5) provides that copyright does not subsist in any design registered under laws relating to industrial design, reflecting a policy choice to separate copyright from industrial design protection. Section 13A further limits copyright in design documents and models. It allows the making and reproduction of articles based on a design document or model, as long as the design is not an artistic work or a typeface. These articles may also be issued to the public or included in films or broadcasts.

For section 13A to apply, the design must be embodied in a document or model created as part of producing articles. This provision effectively removes copyright protection for functional and industrial designs, benefiting industries such as spare parts by allowing reverse engineering.

Effect of Exploitation of Designs Derived from Artistic Works

Section 13B limits copyright where an artistic work has been industrially exploited. When an artistic work is lawfully used for industrial mass production, whether the copyright owner produces the articles themselves or allows another party to do so under licence. Once such authorised products are marketed, copyright protection over the artistic work is limited in time, and after twenty-five years the work may be freely copied by making articles based on it without infringement.

Works of Artistic Craftsmanship

The Act does not define “work of artistic craftsmanship”. Section 7(2) states that works are protected regardless of quality or purpose, but courts play a key role in interpretation.

In ***George Hensher Ltd v Restawile Upholstery Ltd [1974]***, the court held that such a work must be created by an artist-craftsman and must have added artistic character. An armchair was rejected as a work of artistic craftsmanship because it was mainly functional, not artistic.

In ***Merchandising Corporation of America v Harpbond Ltd [1983]***, the court held that facial make-up was not a painting. Whether something qualifies as a painting depends on the facts of each case. Generally, artistic craftsmanship requires something made on a surface and in a permanent form.

4) Protection of Derivative Works

Section 8 protects derivative works, including translations, adaptations, arrangements, and compilations that involve intellectual creation through selection and arrangement.

Protection of derivative works does not affect the protection of the original work. Creating a derivative work usually requires the consent of the copyright owner of the original work. Under section 8(2), copyright subsists in a derivative work as an independent original work.

5) Subject Matter Other Than Original Works

a. Films

Under Section 7(1)(d), films are protected works. Section 3 defines a film as a fixation of visual images capable of being shown as a moving picture, including associated sounds.

In ***Golden China TV Game Centre v Nintendo Co Ltd [1997]***, video games were held to qualify as films because they involve stored sequences of images displayed on screen.

b. Sound Recordings

Section 7(1)(e) protects sound recordings. A sound recording is a fixation of sounds capable of being heard, excluding film soundtracks.

If a sound recording is included in a film with consent, it becomes part of the film. Without consent, it does not. This was shown in ***Rock Records & Tapes Co Ltd v Season Karaoke Sdn Bhd [1999]***. Issues also arise regarding soundtracks and whether cover versions create new copyright, as discussed in ***CBS Record Australia Ltd v Guy Cross***.

c. Broadcasts

Section 7(1)(f) protects broadcasts. A broadcast is a transmission of images, sounds, or information by wire or wireless means that can be lawfully received by the public, including encrypted broadcasts where decryption is provided.

However, Section 59B allows the Minister to exclude certain services, such as interactive services, internal business services, individual domestic services, and certain single-occupier services.

## COPYRIGHT IN PUBLISHED EDITIONS OF WORKS

Copyright protection under the Copyright Act 1987 extends beyond original literary, musical, and artistic works to include copyright in the *published edition* of such works. This form of protection recognises the skill, labour, and judgment involved in the presentation and typographical arrangement of published materials.

### Statutory Basis for Copyright in Published Editions

Section 9(1) of the Copyright Act 1987 provides that copyright shall subsist, subject to the provisions of the Act, in every published edition of one or more literary, artistic, or musical works where either:

(a) the first publication of the edition took place in Malaysia; or
(b) the publisher of the edition was a qualified person at the date of the first publication.

However, this protection does not apply to an edition that merely reproduces the typographical arrangement of a previous edition of the same work or works. This proviso ensures that copyright in published editions protects new effort in presentation rather than mechanical reproduction.

### Meaning of First Publication

The concept of “first publication” is critical in determining subsistence of copyright in published editions. Section 4(3) of the Act provides that a publication is deemed to be a first publication in Malaysia if:

(a) the work or performance was first published in Malaysia and not elsewhere; or
(b) the work or performance was first published elsewhere but published in Malaysia within thirty days of such publication elsewhere.

This definition ensures that works with a sufficient territorial connection to Malaysia receive protection.

### Extension of Protection to Foreign Published Editions

Section 59A(1)(a) empowers the Minister to extend the application of copyright protection to works first published in specified foreign countries. Under this provision, works first published in a specified country are treated in the same manner as works first published in Malaysia.

Regulation 4(c) of the Copyright (Application to Other Countries) Regulations further provides that published editions of literary, musical, or artistic works first published in the United Kingdom (the only country listed in Schedule 3) receive the same protection as those first published in Malaysia.

**Nature and Scope of Protection in Published Editions**

The nature of copyright protection in published editions was examined in ***Nationwide News Ltd v Copyright Agency Ltd* 34 IPR 53.** The court held that what is protected is not the underlying literary or artistic content itself, but the *presentation embodied in the edition*. This includes typographical layout, juxtaposition of text and photographs, use of headlines, type-size, colour, and overall design.

The court recognised that layout and presentation are especially important for newspapers and magazines as they attract readers. The choice of layout, headings, and design elements involves skill, labour, and judgment. Published edition copyright therefore protects the product of this effort.

The House of Lords further clarified that the term "published edition" refers to what a publisher would ordinarily understand as an edition, namely, the product offered to the public, such as a complete newspaper or magazine. Lord Hoffmann rejected the view that each individual article constituted a separate published edition. Instead, the entire newspaper constituted one edition.

**Characteristics of Published Edition Copyright**

Several important principles emerge:

- There is copyright in each new publication that is not a reproduction of an old edition.
- There is no requirement of originality in the underlying content.
- The purpose of this protection is to safeguard publishers of literary, dramatic, musical, and artistic works.
- Publishers of magazines, periodicals, and newspapers frequently rely on this form of copyright to protect typographical arrangements.

**SUBSISTENCE OF COPYRIGHT**

For copyright to subsist under the Copyright Act 1987, four key requirements must be satisfied:

1. Originality

2. Fixation or material form (“as to form”)
3. The work must fall under protected categories
4. Compliance with qualification requirements under section 10

## 1) Originality in Works

Meaning of Originality

Under Section 7(3)(a), a literary, musical, or artistic work shall not be eligible for copyright unless sufficient effort has been expended to make the work original in character. Originality does not mean novelty or inventiveness but requires that the work originates from the author and is not copied.

In ***University of London Press Ltd v University Tutorial Press Ltd*** **[1916] 2 Ch 601**, Peterson J stated that originality concerns the expression of thought rather than ideas. The work need not be novel, but it must not be copied and must originate from the author. The case also reaffirmed that literary works need not be aesthetic in nature. Originality therefore relates to the input of effort, skill, labour, and judgment by the author.

Originality Test in Case Law

The principles of originality have been consistently affirmed in case law:

- In ***University of London Press Ltd v University Tutorial Press Ltd*** **[1916] 2 Ch 601**, there must be originality in term of expression of thought and not idea, the work must not be copied and time spent and common knowledge cannot be used as indicators of originality.
- In ***Re AUVI Trade Mark*** **[1991] 2 SLR(R) 786**, the court held that originality requires that the work originates from the author and the author must extended sufficient skill and labour in the creation of work
- In ***Lau Foo San v Government of Malaysia*** **[1974] 1 MLJ 28**, the High Court initially held that engineering drawings were not original due to copying. On appeal, it was held that even if substantial portions were copied, the work could still be original if it was not a direct tracing and sufficient effort had been expended.
- ***Kiwi Brand (M) Sdn Bhd v Multiview Enterprises Sdn Bhd*** **[1998] 6 MLJ 38** reaffirmed that originality requires both sufficient effort and hard work, and that the expression must not result from copying.

Drafts and preliminary versions do not negate originality. In ***LA Gear Inc v Hi-Tech Sport plc*** **[1992] FSR 121**, the court held that a final work does not lose originality merely because it was preceded by drafts.

Originality in Compilations

Compilations are protected if skill, effort, and judgment are expended in selection and arrangement of material.

In ***MacMillan & Co Ltd v Cooper*** **[1959] Ch 637**, the court held that sufficient labour, skill, and capital must impart the compilation with a character that distinguishes it from raw material.

However, mere listing of facts is insufficient. In ***Hardial Singh a/l Hari Singh v Daim Zainuddin*** **[1991] CLJ 116,** the plaintiff's compilations failed because they followed the government framework and arrangement.

In ***Football League Ltd v Littlewoods Pool Ltd*** **[1959] Ch 637**, the court held that even compilations involving painstaking hard work may qualify for protection. The fixture list involved skill, labour, judgment, and ingenuity, and copyright subsisted.

The court rejected attempts to separate skill expended at different stages of compilation, holding that the final product resulted from cumulative effort.

Originality in Artistic Works

Issues of originality also arise where drawings are derived from earlier drawings.

In ***Interlego AG v Tyco Industries Inc*** **[1989] AC 217**, the Privy Council held that minor technical modifications without significant visual differences do not create a new original work. Tracing over an existing drawing with small changes was insufficient. The question to be asked is whether there is significant visual difference in the new work

However, in ***Biotrading and Financing OY v Biohit Ltd*** **[1996] FSR 393**, the creator made preliminary sketches and prototypes, tested each part alone and with others, and sometimes modified earlier components. The court, referring to LA Gear v Hi-Tec [1992], held that final drawings remain original even if based on earlier sketches or minor modifications. Each drawing created by the author is an original work.

2) Fixation: "As to Form"

Section 7(3)(b) requires that a work must be written down, recorded, or otherwise reduced to material form. This requirement ensures certainty and enforceability.

Key concepts include:

- Fixation: embodiment of sounds or images in a material form sufficiently permanent.
- Recording: sound recording or film.
- Material form: any form of storage from which the work can be reproduced.

3) Protected Categories of Works

Section 7(1) protects literary works, musical works, artistic works, films, sound recordings, and broadcasts. Section 7(2) confirms that works are protected irrespective of quality or purpose, while section 7(2A) excludes ideas, procedures, methods of operation, and mathematical concepts.

Section 7(4) clarifies that a work is not ineligible merely because it involves infringement of another work. This is not a defence to infringement, but it preserves eligibility for copyright. In ***ZYX Music GmbH v King*** **[1995] FSR 566**, the court confirmed that copying alone does not disqualify a work from protection.

4) Qualification for Copyright Protection

Qualified Person

Under section 10(1), copyright subsists only if the author is a qualified person at the time the work is made. A qualified person is defined in Section 3 as a Malaysian citizen, permanent resident, or a Malaysian-incorporated body corporate.

Foreign authors are protected through section 59A(1)(b), which extends protection to citizens or residents of Berne Convention countries. This is reinforced by the Copyright (Application to Other Countries) Regulations 1990, Regulation 3(e).

Publication Requirements

Section 10(2) sets out publication requirements:

- First publication in Malaysia (read with section 4(3), section 59A, and Regulation 3)
- Architecture erected or incorporated in Malaysia
- Broadcast transmitted from Malaysia

Works Made in Malaysia

Finally, section 10(3) provides that copyright shall subsist in every eligible work if the work is made in Malaysia, notwithstanding other qualification requirements.

**DURATION OF PROTECTION OF COPYRIGHT**

The duration of copyright protection under the Copyright Act 1987 varies according to the category of work concerned. The Act adopts a time-limited monopoly model, balancing the interests of creators with eventual public access.

1. Duration of Protection for Literary, Musical, and Artistic Works

Section 17 of the Copyright Act 1987 governs the duration of protection for literary, musical, and artistic works. The duration differs depending on whether the work is published, unpublished, or published anonymously or under a pseudonym.

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| Published Works | Copyright subsists during the lifetime of the author and continues until the expiry of a period of fifty years after the author's death. |
| Unpublished Works | Where a work remains unpublished before the death of the author, copyright continues to subsist until the expiry of a period of fifty years computed from the beginning of the calendar year next following the year in which the work was first published. |
| Anonymous or Pseudonymous Works | Where a work is published anonymously or under a pseudonym, copyright subsists for fifty years computed from the beginning of the calendar year next following the year in which the work was first published, first made available to the public, or made, whichever is the latest.<br>However, if the identity of the author becomes known, the duration of copyright is recalculated in accordance with the general rule applicable to published works, namely life of the author plus fifty years. |

Other works

| Types of Copyright | Provision | Duration |
|---|---|---|
| Published Editions | Section 18 | Copyright subsisting until the expiry of a period of fifty years computed from the beginning of the calendar year next following the year in which the edition was first published.<br>This duration is independent of the duration of copyright in the underlying literary, musical, or artistic works. |
| Sound Recording | Section 19 | Copyright subsists for fifty years computed from the beginning of the calendar year following the year in which the recording was first published.<br>If the sound recording has not been published, copyright subsists for fifty years computed from the beginning of the calendar year following the year of fixation. The Act |

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| | | therefore recognises fixation as an alternative starting point where publication does not occur. |
| Broadcasts | Section 20 | Copyright in a broadcast subsists until the expiry of a period of fifty years computed from the beginning of the calendar year following the year in which the broadcast was first made. |
| Films | Section 22 | Copyright subsists until the expiry of a period of fifty years computed from the beginning of the calendar year following the year in which the film was first published. |
| Works of Government, Government organizations and international bodies | Section 23 | Copyright subsists until the expiry of a period of fifty years computed from the beginning of the calendar year following the year in which the work was first published.<br><br>This reflects the policy that such works should eventually fall into the public domain despite their institutional origin. |
| Performers right | Section 23A | Rights in a performance subsist until the expiry of a period of fifty years computed from the beginning of the calendar year next following the year in which the performance was given or fixed in a sound recording. |